No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

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BATEMAN & BLAIR, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue whether § 1 of the Federal Arbitration Act, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, applies only to contracts that establish an employer-employee relationship, or whether that exemption also applies to independent contractor agreements.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amicus states that counsel of record for each party has consented to the filing of this amicus brief.

Amicus is committed to a reasonable interpretation of statutes affecting businesses. This means that undefined statutory terms should be construed consistently with their immediate context, not in isolation from that context. This also means that statutory terms should be interpreted consistently with the statute's overarching purpose--here, the Federal Arbitration Act's purpose to enforce arbitration agreements according to their terms. This purpose, coupled with traditional rules of statutory construction, mandates a narrow interpretation of the exemption contained within § 1 of the FAA.

In addition to this amicus brief, NELF has consistently filed amicus briefs in this Court, arguing for the interpretation of federal statutes according to their terms.[2] NELF has also filed numerous amicus briefs in cases in this Court arising under the FAA.[3]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

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[2] *See, e.g., Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); *Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

[3] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

SUMMARY OF ARGUMENT

The phrase "contracts of employment" should be interpreted in its immediate context, under the rule of *noscitur a sociis* ("it is known from its associates"). The phrase modifies "seamen" and "railroad employees," two prominent classes of transportation employees. This indicates that "contracts of employment" must establish an employer-employee relationship.

This meaning is confirmed by applying the related rule of *ejusdem generis* ("of the same kind"), to the residual phrase "any other class of workers," which immediately follows seamen and railroad employees in the exemption. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court applied *ejusdem generis* to narrow the meaning of that residual phrase to other transportation workers only, because the phrase followed specific examples of transportation workers. Here, application of *ejusdem generis* takes the analysis one step further, by limiting the catch-all phrase "any other class of workers" to other transportation workers who are employees, because seamen and railway employees are specific examples of transportation workers who are employees.

These rules of statutory construction serve the overarching purpose of the FAA. The exemption is embedded in a statute whose purpose is to ensure the judicial enforcement of arbitration agreements according to their terms. This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA.

The FAA's exemption for the employment contracts of seamen and railroad employees was apparently intended to leave undisturbed those employees' statutory right, under the Jones Act and the Federal Employers' Liability Act (FELA), respectively, to sue their employer in court for work-related injuries. The FELA and the Jones Act granted those transportation employees a liberalized tort remedy, due to their particularly hazardous working conditions and the inadequacy of state tort law to compensate them for their injuries. Since independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the FAA's scope.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT'S EXEMPTION FOR "CONTRACTS OF EMPLOYMENT" REFERS ONLY TO CONTRACTS THAT ESTABLISH AN EMPLOYER-EMPLOYEE RELATIONSHIP.

At issue is the meaning of the exemption, contained within § 1 of the Federal Arbitration Act (FAA), for "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).[4] Does the phrase

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[4] While this case presents other issues pertaining to the FAA's exemption, NELF addresses solely the interpretation of "contracts of employment," as that phrase is used in the FAA's exemption.

"contracts of employment" refer only to contracts that establish an employer-employee relationship, or does that phrase also include independent contractor agreements? NELF argues that, based on the immediate context of the phrase, the FAA's purpose, and a plausible historical explanation for the exemption, "contracts of employment" must define an employer-employee relationship.

A. When Interpreted Properly, In Its Immediate Context, "Contracts Of Employment" Modifies "Seamen" and "Railway Employees," Which Are Two Prominent Classes Of Transportation Employees, Not Independent Contractors.

The phrase "contracts of employment" should be interpreted in its immediate context. "We must, of course, construe the . . . language in the FAA [exemption] with reference to the statutory context in which it is found . . . ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (interpreting "any other class of workers engaged in . . . commerce," appearing in same FAA exemption). A proper consideration of the neighboring words "seamen [and] railroad employees," two prominent classes of transportation employees, indicates that "contracts of employment" refers only to contracts that establish an employer-employee relationship. Independent contractor agreements, such as the one at issue here, are therefore not exempt from the FAA's mandate to enforce arbitration agreements according to their terms.

Indeed, "we rely on the principle of *noscitur a sociis*--a word is known by the company it keeps--to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving *unintended breadth* to the Acts of Congress." *Yates v. United States*, 553 U.S. 285, 294 (2015) (citation and internal quotation marks omitted). According to "th[is] commonsense canon of *noscitur a sociis*[,] . . . a word is given more precise content by the *neighboring words* with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008) (emphasis added). Accordingly, statutory terms that "are susceptible of multiple and wide-ranging meanings," *id.*, should be limited to a meaning that is consistent with their neighboring terms, to form a unified list of terms serving a common purpose. *See id.* After all, no statutory term is an island, contrary to the First Circuit's approach in this case. "[I]t does not stand alone, but gathers meaning from the words around it." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

When viewed in its immediate context, the exemption applies to "contracts of employment of seamen [and] railway *employees* . . . ." 9 U.S.C. § 1 (emphasis added). Both of these classes of transportation workers are employees. The one ("railroad employees") is expressly identified as such by the FAA, while the other ("seamen") is defined by long-established common law tradition. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 359 (1995) (undefined statutory term "seaman," appearing in Jones Act, means "sea-based

maritime employee[]," based on general maritime law).

Since these named classes of transportation workers are employees, they can only enter into "contracts of employment" that create an employer-employee relationship. Therefore, a contract of employment, as defined by "the company it keeps" in § 1 of the FAA, is a contract that establishes an employer-employee relationship between the transportation worker and the hiring entity. Accordingly, independent contractor agreements fall outside the exemption and are subject to the FAA's mandate.

This limited meaning of "contracts of employment" is confirmed by application of the related rule of statutory construction, *ejusdem generis* ("of the same kind") to the residual phrase "any other class of workers," which immediately follows seamen and railway employees in the exemption. *See Circuit City*, 532 U.S. at 114-15 ("The wording of § 1 [of the FAA] calls for the application of the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (citation and internal quotation marks omitted).

In *Circuit City*, the Court applied the rule of *ejusdem generis* to narrow the meaning of "any other class of workers" to other transportation workers only, because that residual phrase

followed specific examples of transportation workers. *See id.*, 532 U.S. at 115 ("Under this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it[.]").

Here, application of *ejusdem generis* takes the analysis one step further, by limiting the catch-all phrase to other transportation workers who are employees. Since seamen and railway employees are both classes of transportation employees, it follows that the residual phrase "any other class of workers" should refer only to other transportation workers who are also employees, not independent contractors.

B. The FAA's Overarching Purpose Counsels In Favor Of Enforcing, Not Exempting, Arbitration Agreements Under The FAA.

These well-established rules of statutory construction not only make sense of the phrase "contracts of employment" in its immediate statutory context. They also serve the overarching purpose of the FAA, "a statute that seeks broadly to overcome judicial hostility to arbitration agreements . . . . [There is] no reason to abandon the precise reading of a provision that *exempts* contracts from the FAA's coverage." *Circuit City*, 532 U.S. at 118-19 (emphasis added) (citation and internal quotation marks omitted).

That is, the exemption is embedded in a statute whose "principal purpose . . . is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (citation and internal punctuation marks omitted). This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA. *Cf. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (when interpreting parties' arbitration agreement under state contract law, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.").

If allowed to stand, the First Circuit's decision would exempt the entire interstate transportation workforce from the FAA's scope. This would mean that interstate carriers could never invoke the FAA to enforce their arbitration agreements with any of their workers. Such an overbroad interpretation of "contracts of employment" would therefore defeat the FAA's purpose with respect to an entire sector of the nation's economy. It is unlikely that Congress could have intended such a result. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

C. The FAA's Exemption For The Employment Contracts Of Seamen And Railroad Employees Indicates Congress's Intent To Leave Undisturbed Those Employees' Statutory Right, Under The Jones Act And The Federal Employers' Liability Act, To Sue Their Employer In Court For Work-Related Injuries.

As the Court has noted, the legislative history underlying the FAA's exemption is "quite sparse." *Circuit City*, 532 U.S. at 119. And while "[i]t is . . . not our job to find reasons for what Congress has plainly done," *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002), NELF nonetheless offers an explanation for why Congress would have exempted the employment contracts of seamen and railroad employees--two classes of transportation employees who are exposed to particularly dangerous working conditions--from the FAA's scope.

In *Circuit City*, the Court observed that, at the time of the FAA's enactment, in 1925, there were other federal statutes that provided seamen and railroad employees with alternative dispute resolution mechanisms for employment-related issues, and that Congress would not have wanted to displace those other statutes with the FAA. *See Circuit City*, 532 U.S. at 121. But those other dispute resolution statutes applied only to employees, as both the petitioner and amicus Chamber of Commerce have argued in their

respective briefs.[5] Accordingly, Congress would not have had any reason to exempt independent contractor agreements from the FAA, because independent contractors were not covered by those other statutes.

In the same vein, NELF believes that when Congress exempted the employment contracts of seamen and railroad employees from the FAA's scope, it also sought to leave undisturbed those employees' statutory right, under the Jones Act, 46 U.S.C. § 30101 *et seq.*, and the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), respectively, to sue their employer in court for work-related injuries.[6] The FELA, enacted in 1908, applies to railroad "employees," 45 U.S.C. § 51, and the Jones Act, enacted in 1920, applies to

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[5] *See* Brief For Petitioner, at 25; Brief Of The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Petitioner (on certiorari), at 6-7.

[6] *See* 45 U.S.C. § 51 ("Every common carrier by railroad . . . shall be liable in damages to any person suffering injury [or death] while he is employed by such carrier . . . , or, in case of the death of such employee, to his or her personal representative . . . ."); 46 U.S.C. § 30104 ("A seaman injured [or killed] in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). *See also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1553 (2017) (FELA "makes railroads liable in money damages to their employees for on-the-job injuries."); *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 427 (2009) ("Enacted in 1920, the Jones Act . . . makes applicable to seamen the substantive recovery provisions of the . . . FELA, . . . which became law in 1908.").

"seamen," 46 U.S.C. § 30104, who are "sea-based maritime employees." *Chandris*, 515 U.S. at 359.

The FELA and the Jones Act granted railroad employees and seamen a liberalized tort remedy against their employers, in state or federal court,[7] due to those employees' particularly dangerous working conditions, and due to the inadequacy of state tort law to compensate them for their injuries:

> FELA was prompted by concerns about the welfare of railroad workers. Cognizant of the *physical dangers of railroading* that resulted in the death or maiming of thousands of workers every year, and *dissatisfied with the tort remedies available under state common law*, Congress crafted a federal remedy that shifted part of the human overhead of doing business from *employees* to their *employers*.

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[7] *See* 45 U.S.C. § 56 ("The jurisdiction of the courts of the United States under this chapter [the FELA] shall be concurrent with that of the courts of the several States."); 46 U.S.C. § 30104 (incorporating FELA remedies in Jones Act). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994) ("[T]he Jones Act . . . authorizes a seaman who suffers personal injury 'in the course of his employment' to bring 'an action for damages at law,' . . . over which state and federal courts have concurrent jurisdiction.").

Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 179 (2007) (emphasis added) (citation and internal quotation marks omitted); *Chandris*, 515 U.S. at 370 ("The Jones Act remedy is reserved for sea-based maritime *employees* whose work regularly exposes them to *the special hazards and disadvantages* to which they who go down to sea in ships are subjected.") (emphasis added) (citation and internal quotation marks omitted).

To achieve their remedial purpose, the FELA and the Jones Act abrogated employers' common law defenses to liability, such as the fellow-servant rule and assumption of the risk, which had made recovery extremely difficult for employees under state tort law.[8] "A primary purpose of the [FELA, and by incorporation, the Jones Act,] was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious

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[8] *See* 45 U.S.C. § 51 (FELA eliminates fellow-servant rule by imposing liability on railroad common carrier for employee's work-related injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."); 45 U.S.C. § 53 (FELA eliminates defense of contributory negligence in favor of comparative fault); 45 U.S.C. § 54 (FELA eliminates assumption of risk); 45 U.S.C. § 55 ("Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void[.]"); 46 U.S.C. § 30104 (Jones Act applies FELA remedies to seamen). *See also Chesapeake & Ohio Ry. Co. v. De Alley*, 241 U.S. 310, 313 (1916) (FELA abrogated fellow servant rule).

cases." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987). *See also Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633, 638 (E.D. Va. 1966) ("In essence, [the FELA and the Jones Act] substituted a new statutory remedy for an overly restricted common-law remedy.").[9]

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[9] In effect, the FELA and the Jones Act were negligence statutes that presaged the no-fault workers' compensation statutes that were taking hold at the state level at the time of the FAA's enactment, and then later at the federal level, to compensate employees for work-related injuries. *See* Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States 1900-1930*, National Bureau of Economic Research, NBER Working Paper No. 5840, Nov. 1996 (available at http://www.nber.org/papers/w5840, at 49 (Table 3, "Years in Which States First Adopted a Workers' Compensation Law") (last visited May 21, 2018). *See also Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193–94 (1983) (discussing Federal Employees' Compensation Act, 5 U.S.C. § 8116(c), as adopting "the [same] 'quid pro quo' . . . commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the [employer]," and noting that "[t]his compromise is essentially the same as that found . . . in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a).").

As with the FAA's exemption, contemporaneous state workers' compensation statutes also required a "contract of employment"--i.e., a contract establishing an employer-employee relationship--and they were also limited to employees who were engaged in certain hazardous occupations. *See Madera Sugar Pine Co. v. Indus. Accidental Comm'n of State of California*, 262 U.S. 499, 501–02 (1923) ("This Court has in several cases sustained the constitutionality of workmen's compensation acts . . . establishing exclusive systems governing the liabilities of

It appears likely, then, that the FAA exempted the employment contracts of seamen and railroad employees in order to leave undisturbed those employees' statutory right, under the Jones Act and the FELA, to sue their employer in court for negligence, free and clear of the employer's traditional affirmative defenses. "It is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory schemes covering specific workers." *Circuit City*, 532 U.S. at 121.[10] Since

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employers in *hazardous occupations* in respect to compensation for industrial accidents to employees resulting in disability or death . . . .") (emphasis added); *Anderson v. State Indus. Acc. Comm'n*, 215 P. 582, 585 (Or. 1923) ("To be a workman within the meaning of the statute there must be an employer, and this employer must contract for and secure the right to direct and control the services of the workman, while the workman himself must engage to furnish his services subject to the direction or control of the employer. *To create this relation there must be a contract of employment*, either express or implied . . . .") (emphasis added); *Kackel v. Serviss*, 167 N.Y.S. 348, 350 (App. Div. 1917) ("The [New York] Workmen's Compensation Law does not cover all *contracts of employment*; it attempts to provide only for the *hazardous occupations* enumerated in the law . . . . The existence of the fact of a contract [of employment] is essential to the operation of the Workmen's Compensation Law; without such a contract the statute has no operation whatever . . . . The question here is, not whether there is evidence to show that [the worker] was an *independent contractor*, but whether [the hiring entity] entered into a *contract for [his] employment* . . . .") (emphasis added).

[10] For instance, Congress could have been concerned that, since the FAA does not permit judicial review for errors of law, seamen and railroad employees with meritorious claims under the Jones Act and the FELA could be denied recovery

independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the scope of the FAA.[11]

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in arbitration when they may have prevailed in court. *See* 9 U.S.C. § 10(a) (enumerating exclusive, non-substantive bases for federal judicial review of arbitral awards).

[11] Independent contractors are excluded from these statutes because their agreements, by their own terms, define a relationship in which the hiring entity does not have the right to control the contractor's work or workplace. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.").

Therefore, the hiring entity, unlike the employer, is generally not liable for the independent contractor's work-related injuries. *See, e.g., Farabaugh v. Pennsylvania Tpk. Comm'n*, 911 A.2d 1264, 1273 (Pa. 2006) ("[G]enerally, landowners employing independent contractors are exempt from liability for injuries to an independent contractor's employees absent an exercise of control over the means and methods of the contractor's work . . . ."); *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 957 (Ind. 2005), *abrogated on other grounds by Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345 (Ind. 2006) ("As a general rule, a property owner has no duty to furnish the employees of an independent contractor a safe place to work, at least as that duty is imposed on employers."); *O'Connor v. Diamond State Tel. Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985) ("The applicable law is that neither an owner nor general contractor has a duty to protect an independent contractor's employee from hazards created by the doing of the contract work or the condition of the premises or the manner in which the work is performed[,] unless the owner or general contractor retains active control over the manner in which the work is carried out and the methods used."); Restatement (Second) of Torts §§ 343-343A (discussing limited bases for holding property

In sum, independent contractor agreements fall outside the area of concern that Congress was addressing when it exempted the employment contracts of seamen and railroad employees from the FAA, thereby leaving undisturbed those employees' judicial remedies under the Jones Act and the FELA. Congress simply had no reason to exempt independent contractor agreements from the FAA's mandate to enforce arbitration agreements according to their terms.

CONCLUSION

For the reasons stated above, the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

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owner liable for invitee's injuries, under premises liability law).